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Nos. 91-746 and 91-748

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN C. BEST and GREGORY J. BEWICK, PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL F. CONARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners' rights were violated by the jury's consideration during its deliberations of binders containing a selection of government exhibits.

2. Whether the district court conducted adequate voir dire on the extent of the jurors' reliance on the binders of government exhibits.

3. Whether the court of appeals applied the correct standard of review in determining that the presence of the government exhibit binders in the jury room did not require reversal of petitioners' convictions.

4. Whether the district court was required to obtain sworn statements from the prosecutor and the case agent before ruling on the motion for a new trial based on the presence of the exhibit binders in the jury room during deliberations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

Statutes and rule—Continued: Page

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-22) is reported at 939 F.2d 425. The panel opinion of the court of appeals (Pet. App. 25-36), vacated on rehearing (Pet. App. 45), is reported at 913 F.2d 1179.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1991. The petitions for a writ of certiorari were filed on November 4, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners John C. Best and Gregory J. Bewick were convicted of conspiracy, in violation of 18 U.S.C. 371; 14 counts of mail fraud, in violation of 18 U.S.C. 1341; eight counts of misapplication of savings and loan funds, in violation of 18 U.S.C. 657; six counts of making false statements to the Federal Home Loan Bank Board, in violation of 18 U.S.C. 1001; participation by a bank officer in a loan transaction, in violation of 18 U.S.C. 1006; and participating in the affairs of an enterprise through a pattern of racketeering, in violation of the RICO statute, 18 U.S.C. 1962(c). Best was also convicted on an additional count of participation by a bank officer in a loan transaction. Petitioner Paul F. Conarty was convicted of mail fraud; three counts of misapplication of funds; and two counts of making false statements. Gov't C.A. Br. 3-4.

Best was sentenced to a year and a day in prison, three years' probation, and 500 hours of community service. Bewick was sentenced to six months' work release, three years' probation, and 500 hours of community service. Conarty was sentenced to three years' probation and 400 hours of community service. Pet. App. 4. A panel of the court of appeals initially reversed petitioners' convictions. *Id.* at 25-37. On rehearing, the en banc court vacated that decision, *id.*

at 45, and affirmed petitioners' convictions. *Id.* at 1-24.

1. In 1981, the American Heritage Savings and Loan Association (American) was experiencing severe financial difficulties. Best was American's president and chaired its Board of Directors. Bewick was American's executive vice-president and managing officer. Conarty later joined American as its in-house counsel. From 1981 to mid-1983, Best, Bewick, and Conarty engaged in improper transactions in an effort to keep American from failing. Pet. App. 2. Those transactions enabled American to continue its operations one year past the point of insolvency and delayed the takeover of American by federal bank regulators. *Id.* at 4.

American and its subsidiaries owned a large amount of real estate as a result of loan foreclosures. The real estate, known as "real estate owned" or "REO," was undesirable because it was a non-earning asset for American. In order to remove some of the REO from American's books, Best and Bewick arranged to have borrowers acquire the REO. For the down payments on those purchases, the borrowers used as much as was needed of the proceeds of loans from American. That scheme resulted in the sale of REO to borrowers who put no cash down and were typically known by Best and Bewick not to be creditworthy. Best and Bewick also inflated the purchase prices of the REO in order to allow American to record a profit on the sales. Despite the dangerous and improper character of those transactions, which lost money for the bank, Best and Bewick paid themselves large bonuses with funds from a bank subsidiary. Pet. App. 2-3.

In early 1983, Conarty became American's in-house counsel. In that capacity, Conarty participated

in a transaction in which American loaned funds to a partnership, two of whose partners were ineligible to borrow additional funds from the bank. Conarty also knew that one of the partners was involved in bankruptcy proceedings. Although the loan was ostensibly made to purchase real estate owned by American, two of the partners used the loan proceeds to pay off pre-existing, unrelated debts. Conarty was aware of that misuse of bank funds. Pet. App. 3.

2. On April 20, 1987, petitioners' seven-week jury trial commenced. Soon after the trial began, the government provided each juror with a loose-leaf notebook that contained key government exhibits, grouped by transaction. The binders were to be used to help the jurors understand the exhibits as they were described during trial. The trial judge instructed the jurors not to look in the binders until a particular exhibit was admitted into evidence; jurors were then instructed to look at the particular exhibit. The binders were used by the jurors throughout the trial, without objection by petitioners. By the end of the trial, each document in the binders had been admitted into evidence. Pet. App. 4-5, 9-10.

At the conclusion of the trial, the jurors left the binders in the jury box. On June 9, 1987, the prosecutor and defense counsel met to review the nine boxes of government exhibits and the one box of defense exhibits to determine what documents should be sent into the jury room. The boxes were lined up on the spectator bench in the courtroom. According to petitioners' counsel, the prosecutor promised that the binders would not be sent to the jury room. According to the prosecutor, no such promise was made. After the trial judge resolved some minor disputes over the exhibits, defense counsel left the courtroom.

The prosecutor and the FBI case agent then loaded the exhibits, including the binders, onto a cart, which the marshal took into the jury room. Pet. App. 5.

After four days of deliberations, counsel for one of the defendants learned that the binders were in the jury room and moved for a mistrial. The defense asserted that the binders, by emphasizing the government's exhibits, served as roadmaps for conviction. The defense also claimed that the defendants neither knew of nor consented to the jury's use of the binders during deliberations. Pet. App. 5-6, 87-89. With the agreement of the government, the trial judge had the binders removed from the jury room that evening. On the next day of deliberations, the jury returned its verdict. Thereafter, the trial judge individually examined each juror to determine whether any juror had used the binders of exhibits to the exclusion of the original exhibits. Each juror indicated that the binders were used only in connection with the use of the original exhibits. The jurors also indicated that they had examined the original exhibits. *Id.* at 6-7, 134-147. The court denied the motion for a mistrial. *Id.* at 102, 121, 131.

Before sentencing, petitioners moved for a new trial. They contended that the government had engaged in misconduct by misleading the defense about the evidence that would be sent to the jury. Petitioners also argued that the binders had prejudicially influenced the jurors in their deliberations. The district court denied that motion. The court noted that all the exhibits in the binders had been admitted into evidence during the trial; accordingly, there was no concern that jurors had obtained access to materials that were not properly before them. In light of that finding, the court concluded that a hearing on the allega-

tion of government misconduct was not necessary.[1] Pet. App. 7-8, 158.

3. A panel of the court of appeals reversed. Pet. App. 25-36. The panel stated that "in all likelihood the prosecutor dispatched the binders to the jury knowing that they were not supposed to go there." *Id.* at 32. The panel then determined that such conduct would warrant a new trial "if there was a 'reasonable possibility' that the presence of the unauthorized materials affected the jury's verdict." *Ibid.*, quoting *United States* v. *Bruscino*, 687 F.2d 938, 940 (7th Cir. 1982) (en banc), cert. denied, 459 U.S. 1211 (1983). In the court's view, such a possibility existed. Pet. App. 36.

The panel rejected the government's contention that the binders could not have affected the verdict since the documents were in evidence and the binders had been available to the jurors throughout the trial. The panel found that, unlike the boxed exhibits, the binders presented the evidence in a way that was favorable to the government's theory of the case. Pet. App. 32-33. The submission of the binders to the deliberating jury therefore amounted, the panel believed, to a "subtle" form of "jury tampering," *id.* at 35, that warranted reversal.

4. The en banc court vacated the panel decision and affirmed petitioners' convictions. The court noted that the threshold issue was whether the district court "acted reasonably in refusing to set aside the verdict because it found no possible prejudice." Pet. App. 8. Review of the district court's determination, the court noted, was guided by the abuse-of-discretion stand-

[1] The court explained that it was not finding that "the government intentionally actually deposited those jury books in there in order to prejudice the defendants." Pet. App. 129.

ard. In light of the record, the en banc court concluded that the district court had not erred. The court explained:

> [A]ll parties agree that the jury properly could review the exhibits contained in the binders—after all, they openly had been examining those binders, document by document, in the course of the seven-week trial, and by the end of the trial, every document in the binder had been admitted in evidence. Thus, it simply could not have been error for the jury to see the exhibits contained in the binders.

Id. at 9-10.

The court rejected the contention that the binders prejudiced the jury during deliberations because they made it easier for the jurors to follow the government's case, and because the jurors might have viewed the absence of any defense binders as a statement that the defense agreed that the government's binders contained all the relevant evidence. That claim, the court found, ignored the fact that the binders contained only copies of documents admitted in evidence, and that the original exhibits, both the government's and the defendants', were readily available to the jury. The binders were no more "roadmaps to conviction," the court noted, than were the ten boxes of carefully ordered government exhibits. Pet. App. 10.

The en banc court also emphasized that the district court had confirmed, through voir dire of each juror, that the jurors considered all the evidence, not just the binders, in arriving at their verdicts. The trial court's inquiry strengthened the court's belief that "the district court's denial of the defendants' motion for a mistrial was not an abuse of discretion." Pet. App. 12. Because the district court had not erred in finding an absence of prejudice in the jury's consid-

eration of the binders, the en banc court found it unnecessary to review petitioners' claims of prosecutorial misconduct. *Id.* at 13. The court further concluded that the district court had not abused its discretion in declining to hold an evidentiary hearing on petitioners' contention that the prosecutor had improperly sent the binders to the jury room.[2]

ARGUMENT

1. Petitioners contend (91-746 Pet. 10-19; 91-748 Pet. 18-20) that the jurors' use of the jury binders during deliberations violated petitioners' right to due process and to a jury trial. Specifically, petitioners argue that the binders distorted the evidence and were provided to the jury without the consent of the judge or the defendants as the result of misconduct by the prosecutor. That fact-specific contention was correctly rejected by the court of appeals and warrants no review by this Court.[3]

The initial question, as the court of appeals recognized, was whether petitioners suffered any prejudice as a consequence of the jury's consideration of the binders. Pet. App. 8. The conduct of the prosecutor, unless it had an impact on petitioners' sub-

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[2] Five judges dissented, arguing that the prosecutor had introduced "unauthorized" materials (the binders) into the jury room, and that the consideration of the binders by the jury raised the possibility that petitioners had been prejudiced because the binders contained a "tendentious compilation of exhibits already in evidence." Pet. App. 15-22.

[3] Petitioners have filed a motion in this Court requesting that the clerk of the court of appeals be required to transmit the jury binders to this Court for consideration in connection with the petitions for certiorari. We have no objection to petitioners' motion.

stantial rights, would not warrant reversal of the convictions. Fed. R. Crim. P. 52(a); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988). That rule applies even when the defendant alleges a due process violation based on the prosecutor's conduct. *United States* v. *Hasting*, 461 U.S. 499, 504-505 (1983); *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."); see also *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263-1266 (1991). As both the district court and the en banc court of appeals found, there was no prejudice to petitioners in this case, and a new trial is unwarranted.

Each of the exhibits contained in the binders had been admitted in evidence. Moreover, as the district court noted, the jurors had the binders available "on their laps for almost two months." Pet. App. 103. In those circumstances, the district court reasonably concluded that it need not declare a mistrial simply because the jury saw the binders during deliberations; the court indicated that it "was not error at all by virtue of the fact that every exhibit in that book was received in evidence." *Id.* at 148. The district court was within its bounds in finding that the use of the book would not distort the jury's deliberations. As the Seventh Circuit noted in a related context:

> The trial judge will always be in a better position than the appellate judges to assess the probable reactions of jurors in a case over which he has presided * * *. As we cannot put ourselves in the district judge's shoes in these matters we ought to accept his judgment unless we have a very strong conviction of error.

United States v. *Bruscino*, 687 F.2d 938, 941 (1982) (en banc), cert. denied, 459 U.S. 1211 (1983).

Best and Bewick argue (91-746 Pet. 10-12) that this case is akin to those involving *ex parte* contacts with jurors, or those in which jurors have received erroneously admitted documents or documents that were not admitted at all that described the government's theory of the case. The jury's consideration of binders of evidence that they had been using for weeks, however, is a far different matter from its exposure to outside materials or influences. It is difficult to see how the binders could permissibly be used throughout this lengthy trial (a procedure that petitioners did not challenge) and yet be considered prejudicial when they reached the jury room. Petitioners cite no case, and we know of none, in which a court has reversed a criminal conviction based on the submission to the jury of exhibits bound in a particular form.[4]

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[4] Each of the cases claimed by petitioners to conflict with the majority's decision (see 91-746 Pet. 19-20; 91-748 Pet. 12) involved the submission to the jury of erroneously admitted documents or documents that were not admitted at all. See *United States* v. *Pendas-Martinez*, 845 F.2d 938, 940-943 (11th Cir. 1988) (reversing convictions due to jury's consideration of inadmissible hearsay statement of Coast Guard officer); *United States* v. *Brown*, 451 F.2d 1231, 1233-1234 (5th Cir. 1971) (reversing convictions due to submission to jury of agent's notes, which were not admitted at trial and were "a neat condensation of the government's whole case against the defendant[s]"); *United States* v. *Adams*, 385 F.2d 548, 549-551 (2d Cir. 1967) (conviction reversed because district court allowed jury to review incriminating writing by government agent that had not been received in evidence); *Sanchez* v. *United States*, 293 F.2d 260, 267-269 (8th Cir. 1961) (reversal for erroneous admission of envelopes bearing hearsay notations by law enforcement agent); *United States* v. *Ware*, 247 F.2d 698, 699-701 (7th Cir. 1957) (same).

Petitioners suggest (91-746 Pet. 17) that "the majority gives a license to federal prosecutors * * * to send whatever they want to a deliberating jury, secure in the knowledge that the means by which the jury obtained the material is absolutely irrelevant." That contention is unfounded. The court of appeals did not hold that extraneous material may be sent to the jury; it held only that, when there is no prejudice to the defendants, the remedy of a new trial is not the proper means to address claims of prosecutorial misconduct. Nor did the court suggest that a prosecutor who circumvents court rules in sending material to the jury would be immune from administrative sanctions within the Department of Justice, or from being chastised in a judicial opinion. These remedies "allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant" who has been convicted after a fair trial. See *Bank of Nova Scotia* v. *United States*, 487 U.S. at 263.

2. Petitioners assert (91-748 Pet. 11-15) that the district court's voir dire of the jurors was inadequate to ensure that they had not misused the binders during deliberations. The district court asked each juror whether he or she had used the binders and, if so, whether they were used to the exclusion of the other exhibits. See Pet. App. 134-147.[5] In response to the court's questions, the jurors explained that

[5] In asking those questions, the court understood that petitioners' argument was that the binders were "like a government's brief being in the jury room," Pet. App. 130, and the court sought to remove speculation that the binders were used to the exclusion of other evidence. As the court put it, "What I want to know is whether the use of these jury books resulted in their verdict irrespective of what they heard and irrespective of the evidence." *Id.* at 133.

although they used the binders during deliberations, they considered other exhibits "[m]ore so than the book, itself," *id.* at 134, that they "went through the files, and the charts, and everything," *id.* at 137, and that they "were in and out of all of those boxes, many more of those boxes than I suppose you'd even suspect. It was very interesting." *Id.* at 138. One juror explained that "[t]he only time we used the book is when we wanted to get into the file, and that was one item that was in the file. So rather than pass the one item around, everybody looked at the book." *Id.* at 139.

Conarty argues that the district court should have probed further into how each juror used his or her binder. 91-748 Pet. 13-15. That argument comes with poor grace from petitioners, who urged the district court that the only relevant question was whether the jury used the binders; if so, petitioners argued, a mistrial was mandated. Pet. App. 131-133.[6] In sum, once the district court was satisfied that the binders had not led the jury to ignore the evidence contained in the exhibit boxes, the court reasonably concluded that petitioners were not prejudiced. The court was not required to inquire further into the way the jurors used the binders.

3. Petitioners contend (91-746 Pet. 23-27; 91-748 Pet. 15-17) that the court of appeals misapplied the standard for determining whether a new trial was warranted. There is no dispute that the correct standard is whether there was a "reasonable possibility" of prejudice to the defendants from the jury's

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[6] Although the court indicated that it was willing to inquire whether the jurors looked at defense as well as government exhibits if petitioners' counsel wished, the defense specifically asked the judge not to do so. Pet. App. 141-142.

consideration of the binders. *United States* v. *Bruscino*, 687 F.2d at 940. Petitioners assert, however, that the court of appeals failed to conduct a sufficiently searching inquiry into the possibility of prejudice.

Both the district court and en banc court of appeals considered and rejected the claim that there was a reasonable possibility of prejudice in this case. The district court, which had the greatest familiarity with the contents of the binders and their likely effect on the jury in light of all the circumstances of the trial, found no prejudice "by virtue of the fact that every exhibit in that jury book was received in evidence." Pet. App. 148. The en banc court of appeals similarly rejected the "only contention of prejudice"—that the arrangement of documents in the binders was a "roadmap[]" to conviction. Pet. App. 10. As the court of appeals noted, petitioners did not object when the binders were distributed to the jury during trial; petitioners themselves "frequently directed the jury's attention to the binders in order to focus the jurors on a particular document or transaction"; the district court ascertained that all the exhibits in the binders were admitted into evidence; and the binders had been used by the jurors routinely throughout the seven-week trial. *Ibid.* Against that background, the court of appeals had a sufficient basis for concluding that there was no "reasonable possibility" that the presence of the binders improperly influenced the jury's deliberations.[7]

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[7] Petitioners cite several court of appeals cases (91-746 Pet. 24) for the proposition that "[w]hen unauthorized material is present in the jury room, the government must demonstrate, beyond a reasonable doubt, that its presence did not affect the verdict." The cited cases, however, do not apply

4. Finally, Best and Bewick argue (91-746 Pet. 27-29) that the district court was required to obtain sworn statements from the prosecutor and the FBI case agent before resolving the motion for a new trial. Both the prosecutor and the case agent submitted statements in the form of affidavits (although they were not notarized), Pet. App. 77-83, and they were prepared to give sworn testimony regarding petitioners' allegations. *Id.* at 8. In light of the court's finding that there was no possibility of prejudice, however, the court correctly concluded that the issue of how the binders got into the jury room had become moot. There was, therefore, no need for the district court to determine the facts surrounding that issue or to consider whether the absence of a notary seal from the governments' initial affidavits should be given any weight.

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here; in each the jury considered materials that were not admitted into evidence. *United States* v. *Tebha*, 770 F.2d 1454, 1456 (9th Cir. 1985) (consideration by jury of exhibit that was not admitted in evidence); *United States* v. *Jonnet*, 762 F.2d 16, 18-20 (3d Cir. 1985) (entire deposition transcript sent to and used by jury where district court had ruled that only portions of transcript were to go to jury); *United States* v. *Littlefield*, 752 F.2d 1429, 1431-1432 (9th Cir. 1985) (use of issue of *Time* magazine brought in by juror). In this case, the evidence as arranged in the binders had properly been before the jury during the seven weeks of trial.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

ANDREW LEVCHUK
Attorney

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